wholesale service (which is purchased on the end user's behalf by the ISP, who is then the subscriber of record) or by competitive cable modem services (which have a very limited choice of ISP, if any choice at all). Qwest contends its Petition does not involve its wholesale DSL services, presumably to give the impression that such services and those who rely upon them would remain "unaffected" by grant of the Petition, but it is impossible to separate the two. Wholesale and retail DSL are inextricably linked because Qwest is not only the dominant retail provider, it has even more dominance in the wholesale DSL market. With retail pricing flexibility in hand, Qwest will have legal authority to undercut competitors who rely on its wholesale DSL. Sure, Qwest will have greater flexibility to compete head-to-head with cable for retail customers, but that same flexibility can and will also be used to snuff out whatever intramodal competition currently exists.

Intramodal competition and the continuance of competitive choices for consumers demand the denial of Qwest's Petition.

3. The Broadband Market is Not Robustly Competitive.

FCC precedent rejects forbearance *except* where there is clear and substantiated evidence of a robust competitive market.[37] As proof of a robust competitive market, Qwest cites the existence of access via cable modem, wireless and satellite providers and the emergence of BPL. According to Qwest, if it attempted to charge unjust or unreasonably discriminatory rates,

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[37] *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Sixth Memorandum Opinion and Order, 14 FCC Rcd 10840 (1999) (incumbent LECs failed to meet first prong of Section 10 forbearance standard where incumbents did not demonstrate that they face "substantial competition"); *see also*, *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Third Memorandum Opinion and Order, 14 FCC Rcd. 10816, ¶ 12 (1999) (first prong of Section 10 forbearance test not met where "independent LECs have sufficient ability through their control of bottleneck facilities to harm the in-region long distance services market by engaging in cost misallocation, access discrimination, and price squeeze); *In the Matter of 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers; United States Telephone Association's Petition for Forbearance from Depreciation Regulation of Price Cap Local Exchange Carriers*, Report and Order in CC Docket No. 98-137 Memorandum Opinion and Order in ADS 98-91, 15 FCC Rcd. 242, ¶ 54 (1999) (under first prong of forbearance test, incumbent LECs failed to "demonstrate that the local exchange market is sufficiently competitive" to warrant forbearance).

customers would turn to these other providers. Qwest is wrong. In order to reach its self-serving conclusion, Qwest must ignore customers of wholesale DSL services. FISPA members belong to this community of customers and they will attest that, even in the face of unjust and discriminatory wholesale DSL rates, they have no choice but to continue purchasing broadband access from ILECs, such as Qwest.[38]

From technological limitations to insufficiently competitive market forces, the "other" broadband delivery platforms Qwest identifies to support its case for forbearance remain out of reach to most consumers. They are not broadly available to the public and even less so to independent ISPs and other wholesale customers. In reality, there are only two broadband delivery options available to the public: ILEC DSL and cable, and only one that is available at wholesale: ILEC DSL.[39] Qwest is wrong when it claims that the telephone network is no longer the primary means for customers to obtain broadband access. As is shown below, Qwest's assertions simply are not true.

- ***Wireless and Satellite Options are Limited and Generally Unacceptable.***

One of many flaws in Qwest's argument is that it fails to recognize that satellite and wireless services are neither reliable nor affordable for most customers and, thus, are *not* viable

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[38] Independent ISPs across the country will attest, the broadband market is not competitive. *See BellSouth Opposition* at pp. 31-36, citing to ISP declarations: BluegrassNet Declaration at ¶¶ 24-30; LexiSoft Declaration at ¶ 5 ("The existing marketplace lack competitively priced, technologically-equivalent and commercially-available alternatives to BellSouth and/or other ILEC wholesale transmission services which are essential for our company to provide broadband ISP services to our existing and prospective customers"; CSSLA Declaration at ¶ 5 (accord); SiteStar Declaration at ¶ 5 (accord); WebKorner Declaration at ¶ 5 (accord); Kinex Declaration at ¶ 5 (accord); Bayou Declaration at ¶ 5 (accord); GoldCoast Declaration at ¶ 5 (accord); ECSIS Declaration at ¶ 5 (accord); COL Declaration at ¶ 5 (accord); Supernova Declaration at ¶ 5 (accord); Computer Office Solutions Declaration at ¶ 5 (accord); Mecklenburg Communications Declaration at ¶ 5(accord); WCK Declaration at ¶ 5 (accord); C-N-S Declaration at ¶ 5 (accord); Acceleration Declaration at ¶5 (accord).

[39] FISPA points out that, while not directly relevant to the relief Qwest seeks, for independent ISPs, Cable is not an available alternative and therefore offers no competition in the market for broadband services. *See BellSouth Opposition* at pp. 28-31 citing LexiSoft Declaration at ¶ 7; CSSLA Declaration at ¶7; SiteStar Declaration at ¶7; WebKorner Declaration at ¶ 7; BluegrassNet Declaration at ¶ 28; Kinex Declaration at ¶ 7; Bayou Declaration at ¶7; GoldCoast Declaration at ¶ 7; ECSIS Declaration at ¶ 7; COL Declaration at ¶ 7; Supernova Declaration at ¶ 7.

options. Recent data confirms this conclusion, finding that all other providers, including fixed-satellite and wireless, captured just over 3% of the market.[40]

For many reasons, satellite and wireless, *cannot* be considered a contributing factor in the competitive equation.[41] Licensed spectrum is very costly in most areas, if available at all. Unlicensed spectrum is limited both in availability and power. Because of the low power limit, range is necessarily limited. The best results are found in rural areas that are flat (to avoid being blocked by hills), dry (to avoid rain and fog attenuation), and treeless (to avoid signal

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[40] *FCC High Speed Services for Internet Access Services: Status as of June 30, 2004* – Table 1; Pew Internet Project Data Memo.

[41] Likewise, these services are not options for small business and independent ISPs. *See e.g., BellSouth Opposition* at pp. 39-41 citing ISP Declarations: WebKorner Declaration at ¶8 ("Our company investigated the possibility of providing service via Satellite. After investigation, we determined that Satellite service is not technologically comparable to landline broadband due to latency and inadequate upload/download speeds."); BluegrassNet Declaration at ¶¶ 24-27 ("While wireless and satellite technology are sometimes available, they are not reliable enough for BluegrassNet to be considered ready for business class services. This is especially true in more urban areas … there are tremendous difficulties in the open spectrums in the more populated areas at this particular time …. Not only has BluegrassNet attempted to run wireless, but our competitors … have attempted the same thing, and up until this point, all but one have resigned themselves to the fact that there is too much interference and not enough reliability to make it viable for business purposes."); Bayou Declaration at ¶ 8 ("… Our experiences selling our ISP services through Satellite over the past one and a half years have been poor. First, the upfront equipment costs the Satellite company requires customers to pay are unattractive and, second, the technology utilized is not the equivalent of our existing ILEC wholesale supplier. In other words, the upload/download speeds simply were not comparable and is not satisfactory to our existing or prospective customers."); GoldCoast Declaration at ¶ 8 ("Our company investigated Broadband over … Satellite. Our research concluded that … Satellite service is not technologically comparable to landline broadband due to latency and inadequate upload/download speeds. Our core target audience is businesses. There is virtually no way to serve businesses with satellite, especially in downtown areas, where there is not line of sight.); COL Declaration at ¶ 8 ("Our company also explored providing broadband ISP services through a Satellite company offering ISP service in our market. Our exploration concluded abruptly when we determined that the technology used by the Satellite company was not technologically comparable to landline service. In other words, the upload/download speeds simply were not comparable and would not be satisfactory to our existing or prospective customers."); Mecklenburg Communications Declaration at ¶ 7 ("Our company explored providing broadband ISP services through a Satellite company offering ISP service … in our market. Through such exploration our company concluded that providing service via … Satellite would be cost-prohibitive, particularly in the rural areas served by our company."); SiteStar Declaration at ¶ 8 ("Our company also explored providing broadband ISP services through iSat, a Satellite company offering ISP service in our market. Our company began offering iSat services but due to problems encountered with installation and reliability, most customers who signed up for the service have cancelled. Currently, our company serves less than 10 customers via iSat. In the final equation, the technology utilized by iSat was not the equivalent of our existing ILEC wholesale supplier"); LexiSoft Declaration at ¶ 7 ("Our company explored providing broadband ISP services through … Satellite … we have received no cooperation from the Satellite provider."); WCK Declaration at ¶ 7 ("Our company explored providing broadband ISP services through the Satellite company offering ISP service in our market. This exploration did not progress very far because of two reasons: First, the wholesale pricing offered by the Satellite company was unattractive and, second, the technology utilized was not the equivalent of our existing ILEC wholesale supplier. In other words, the upload/download speeds simply were not comparable and would not be satisfactory to our existing or prospective customers.").

absorption). Thus wireless-ISPs are most heavily concentrated in the area between the Rocky Mountains and the Mississippi River, from Texas to Kansas. A few opportunistically operate in coastal regions, and in flat areas such as Florida. But most providers lack the combination of clear paths and subscriber density needed to make unlicensed wireless access profitable.

In urban areas, interference is also a problem. The unlicensed bands are occupied by cordless phones, microwave ovens, video extenders, home wireless local area networks, public access points, Bluetooth devices, and other sources of interference. The Commission should certainly continue to support wireless operation, but wireless access can never fully substitute for wireline access and it certainly does not now.

- ***Broadband Over Power Is Not A Viable Option.***

That Qwest would suggest the emergence of broadband over power is a contributing factor for a robust, competitive marketplace is a joke. Broadband over power is non-existent in most markets.[42] Nor is it common carriage, so it is unlikely to be available at wholesale to the bulk of ISPs who now depend on ILEC DSL.

- ***Price is But One Factor That Contributes to a Customer's Decision in Choosing a Broadband Service Provider.***

Qwest argues that the regulations are unnecessary because customers choose broadband service based on cost and, therefore, if it charges unreasonable and discriminatory rates,

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[42] *See BellSouth Opposition* at pp. 43-44 citing ISP Declarations, Kinex Declaration at ¶ 9 ("Our company has researched the availability of Broadband over Power Lines ("BPL"). However, the local utility company rolling out BPL is only in testing stages and is not interested in providing wholesale services at this time."); GoldCoast Declaration at ¶ 8 ("Our company investigated Broadband over Power Lines .... Our research concluded that BPL is not available in our market...."); Mecklenburg Communications Declaration at ¶ 7 ("Our company explored providing broadband ISP services through ... a utility company offering Broadband over Power Lines in our market. Through such exploration our company concluded that providing service via ...the utility company would be cost-prohibitive, particularly in the rural areas served by our company."); Acceleration Declaration at ¶ 8 ("Our company has also investigated Broadband over Power Line technology. Currently, BPL is experimental and not deployed or commercially available in our service area.").

consumers will "turn to other providers." Qwest improperly relies on dated and biased surveys and distorted internal data to support its broad and fallacious conclusion.

Conveniently, Qwest's self-serving presentation of its "internal" data paints only a small portion of the customer choice picture. The reality is, as Qwest's own data shows, that cost is but one factor that contributes to a customer's decision to disconnect its broadband service.

Undoubtedly, as with most services, cost is a consideration, but to conclude generally -- as Qwest does in its Petition -- that cost of service is everything, is simply wrong. If, in fact,

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only cost mattered, as Qwest suggests, the independent ISP would be nonexistent. Almost universally, independent ISPs charge more for DSL service than its RBOC/Wholesaler-Supplier. This is because the wholesale DSL price costs as much as RBOC retail offerings, especially when the RBOC's promotional offerings of free modems and installation are taken into consideration.[48]

Furthermore, the "empirical" data Qwest uses to justify its claims does not rise to the level of proof required for forbearance. Qwest relies on the statement of one employee relating a single experience in one Qwest state in one Qwest city - Omaha, Nebraska. But all this shows is an offer by a cable company to a small neighborhood. And while Qwest claims this proves its ability to compete against cable is hampered because it is regulated and cable is not is a leap far too broad to be credible. Qwest operates in 14 states. One isolated incident is not proof of its claim that it is being harmed by its having to operate under the targeted Title II requirements. Indeed, the statement itself and the attachment make no allusions to whether or in what manner Qwest may have responded to the offer being made or why it could not have made an effective response. As to this latter point, Verizon, subject to the same Title II restrictions as Qwest, currently runs an effective television ad campaign in the Washington, D.C. area touting its far lower price for DSL broadband service than the largest cable operator in the country, Comcast.

[48] *See BellSouth Opposition* at pp. 33-36, citing ISP Declarations:

It is clear that Qwest's "facts" and statistics are make weight and in no way relate to its ability to compete by being required to do so in a reasonable and non-discriminatory manner. Indeed, the Commission would be foisting on the public a provider of service obviously more focused on ridding itself of its regulatory requirements than providing quality and fairly priced

service. While bemoaning its regulated position vis-à-vis cable modem providers, it is totally silent on how the Commission, the public and its competitors can be assured that, once released from the duties to be reasonable and nondiscriminatory, it will not cross-subsidize its broadband services with its still dominant monopoly revenues derived from its lock on local exchange services.

Qwest's arguments are not only based on dated statistics (over one year old), but the validity of these statistics (such as are contained in the) are suspect, if not outright meaningless and contradictory to logic. Qwest argues, for example, that it needs to be relieved of its duty to rate average. Its argument is that if relieved of this requirement it could offer lower rates to its customers located in larger low-cost markets than the rates it now offers to its customers in its high-cost markets. Were the Commission to accept this outrageous argument and eliminate the rate averaging requirement it would be lending its hand to the widening of the digital divide that exists in Qwest's 14-state territory. A result that is far contrary to the Commission's and Congress' pledge to eliminate the digital divide as soon as possible.

Qwest's Petition is not only lacking in the type of proof needed to justify the extraordinary remedy of forbearance, it is also disingenuous, a fact that should alert the Commission to Qwest's true intentions – that is, to use "regulatory freedom" to engage in anti-competitive conduct. In short, Qwest's distorted presentation of its data to support its Petition must be disregarded and the Petition must be denied.

4. Continued Regulation is Needed to Ensure Qwest's Market Power is not Used to Undermine Competition.

Section 251(a) of the 1996 Act imposes a general duty upon all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(b)(4). In order to render interconnection and unbundled access economically feasible, the Act requires ILECs to resell their telecommunications services to CLECs at wholesale prices.[49] As an RBOC, Qwest has similar duties under Section 271. Qwest seeks relief of this requirement for its mass market xDSL services.

The implementation of the regulations from which Qwest seeks relief were necessary, in part, to provide some form of equity to competitors entering a market dominated by providers whose network was built by the public. These requirements were based further on the fact that the ILECs are both competitor and supplier and, therefore, are required to prevent anti-competitive practices such as cross-subsidization, price squeezes, predatory pricing and practices.

Granting Qwest's request for forbearance from these requirements is premature because Qwest still controls essential bottleneck facilities and, as discussed, access to alternative platforms for ISPs seeking wholesale broadband presently is unavailable. Relieving Qwest of its regulatory duty to deal and provide DSL at an avoided cost discount would throw small companies, like those of FISPA members, to the antitrust wolves. As will be shown, antitrust

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[49] *Id.* § 251(c)(6). (4) Resale - The duty - (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

laws and the courts entrusted to enforce them are inadequate to protect consumers from anti-competitive practices, particularly small businesses who are consumers of wholesale DSL.

Antitrust law confers a duty to deal in the form of the essential facilities doctrine.[50] The essential facilities doctrine imparts liability on a monopolist who denies competitor access to a resource essential for competition in a relevant antitrust market. Congress enacted the antitrust laws to promote economic efficiency via the protection of the competitive process. Courts and commentators have recognized that distortion occurs in the competitive process when a monopolist refuses access to an essential facility. The instances in which a monopolist has a duty to provide access to an essential facility is "one of the most 'unsettled and vexatious' issues in antitrust law."[51] Antitrust law rarely mandates access to a monopolist's facility for several reasons: (1) liberal access encourages firms to abstain from significant investment initiatives in an attempt to free ride on the investment of their competitors; (2) access inhibits firms from undertaking risky and costly investment in the absence of countervailing first-mover advantages; and (3) mandated access does not have pro-competitive effects unless the terms and conditions of access are reasonable. Absent reasonable access requirements, a monopolist can either permit access on terms that are so onerous that, as a practical matter, access is unavailable[52] or charge monopoly rents for access, in which case price competition becomes impossible.[53]

Blind reliance on antitrust laws to discipline Qwest and other ILECs is insufficient and an unabridged abrogation of the Commission's statutory duties. First, without regulations

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[50] *See* A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA: A STUDY OF COMPETITION ENFORCED BY LAW 67 (2d ed. 1970) ("The Sherman Act requires that where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.").

[51] Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1519 (10th Cir.), *aff'd*, 472 U.S. 585 (1985) (quoting Byars v. Bluff City News Co., 609 F.2d 843, 846 (6th Cir. 1980)).

[52] Robert Pitofsky, Address at the Glasser LegalWorks Seminar on Competitive Policy in Communications Industries, Washington, D.C., *Competition Policy in Communications Industries: New Antitrust Approaches* (Mar. 10, 1997).

[53] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.2b, at 667 (Supp. 1996).

mandating access and avoided cost resale, those most likely to be harmed by Qwest's anti-competitive conduct and pricing are those who can least afford access to the courts – small businesses and individual consumers. Second, invocation of the essential facilities doctrine necessarily implicates the prices upon which access is or is not granted. Invariably, any aggrieved entity will challenge the ILEC's access price on the grounds that the price: (1) is so excessive as to constitute a denial of access; (2) impedes price competition; or (3) precludes a reasonable rate of return.[54] Courts are often ill-equipped to assume adequately the role of a price regulatory agency by entertaining such claims.[55] Courts willing to undertake a price control function still must grapple with the unyielding antitrust principal that a legal monopolist may charge monopoly rents for an essential facility.[56] Additionally, the essential facilities doctrine heavily relies on legal precedent derived from various courts resulting in a lack of coherence and consistency.[57]

The Commission's very existence and the statutes, rules and regulations the Commission is charged with enforcing by Congress, including Sections 251(c) and 271 of the Act, rectifies and avoids many of the problems that elude antitrust enforcement. While FISPA agrees that antitrust laws may one day be enough to discipline Qwest and her ILEC counterparts, that day is

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[54] *See id.*, at 692.

[55] According to one commentator:

> [T]he essential facility doctrine should not be invoked unless there is a pre-existing regulatory agency capable of adequately supervising relief, and there are a number of reasons for completely eliminating the doctrine as an antitrust cause of action. Essential facility issues often are best addressed on an industry-wide basis, through legislation or administrative regulation.

Gregory Werden, *The Law and Economics of the Essential Facility Doctrine,* 32 ST. LOUIS U. L.J. 433, 479-80 (1987).

[56] *See* David J. Gerber, *Rethinking The Monopolist's Duty To Deal: A Legal And Economic Critique Of The Doctrine Of 'Essential Facilities,'* 74 VA. L. REV. 1069, 1087 (1988) (noting that a monopolist can generally "charge a fee that extracts monopoly rents from the users' market"). This situation does not arise when a monopolist is precluded from extracting such fees in the case of a regulated industry. *See id.*

[57] *See generally* Pitofsky, *supra* note 4.

not here. That day will not arrive until competition in *both* the retail and wholesale broadband markets is truly "robust," not just rhetorically robust.

B. FORBEARANCE WOULD HARM CONSUMERS

In order to satisfy the second prong of section 10, Qwest must demonstrate that the regulations at issue are not necessary "for the protection of consumers."[58] Qwest has not shown, nor can it show, that existing marketplace forces would be adequate to constrain its market power and ensure consumers are protected. Granting Qwest's Petition will give Qwest license to charge wholesale rates that raise its rivals' costs. This, in turn, harms consumers, unless those consumers are Qwest's. But once all those consumers are Qwest's, what is left to stop Qwest from raising its retail rates in the duopoly world Qwest envisions? It is well-established that a lack of robust price competition may lead to rates that are excessive and harm consumers.[59] Thus, regulation is necessary for the protection of consumers.

Indeed, as shown in Section IV.C., *infra*, the relief Qwest seeks is the first step down a slippery slope that will eventually harm all consumers.

C. FORBEARANCE IS NOT IN THE PUBLIC INTEREST.

Unlike her sister RBOCs, who have no shame with forbearance requests that overtly seek to exclude independent ISPs from their networks, Qwest's request, at least superficially, appears "ISP-friendly." The Commission must not be fooled by Qwest's smoke screen. Qwest's goals are the same as her sisters'. Qwest's requested forbearance is just the first step down a slippery slope, one which will eventually lead to the extermination of independent ISPs – other than those hand-picked by Qwest.

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[58] 47 U.S.C. § 160(a)(2).

[59] *Special Access Forbearance Order* ¶ 34 ("Absent a sufficient showing of competition, it is clear that regulation of the BOC petitioners' special access and high capacity dedicated transport services is necessary to protect consumers").

Stripped of all the pseudo arguments and self-serving statistics presented by Qwest, the only way to interpret a request to lift the targeted regulatory obligations in regard to broadband its mass market DSL services is that Qwest wants the right to discriminate against its wholesale competitors in favor of itself. More, not less, competition in the market for wireline broadband services, and all communications markets, is and always should be the Commission's paramount goal. Only by ensuring that the conditions needed to stimulate such competition remain in place can the Commission be assured it has satisfied its obligation to the public. The Commission must learn from its long track record of prematurely de-regulating dominant companies and refrain from doing so here.

The forbearance Qwest seeks will have a profound impact on consumers and small businesses, both retail and wholesale, in the short term. The continued diversity of choices to the public rests on their ability to continue to have reasonable access to the network facilities necessary to deliver their services. But the consequences are far graver and far more devastating when one takes a longer view of all of the RBOCs' forbearance requests. What is at stake is the very future of the Internet, technological development, consumer choice and freedom, and with it, America's ability to remain the global leader in information technologies.

Qwest's forbearance request, and others like it, represents a clear and present danger that the future availability of xDSL service will only come from the long entrenched local exchange monopolists. If this danger is realized, the public's current right and capability to choose ISPs, based on their differentiated service offerings and the unique needs of individualized consumers, will be sacrificed.

Entities that have not been born, bred and matured as a monopoly, of necessity, have had to innovate and create service distinctions that appeal to various niche markets – first, in order to

establish a market and, then, to sustain their presence in that market. The independent ISP's business plan seeks not to be the choice for every potential user, but to be an attractive choice to users that may most benefit from its unique services. Forbearance will quickly convert a market of diverse choices into an anachronistic throwback to the days of homogenized, non-differentiated, totalitarian–like services, such as those available in countries that do not value and support free enterprise and free speech, that do not tear down entry barriers, but erect them, that do not allow choice but require purchase of services from a state-controlled entity. Although for different reasons and in different ways, the same smothering atmosphere will be created – not with control directly in government hands, but in the hands of private interests created over decades of sanctioned monopoly and perpetuated by government decision. What will be sacrificed is differentiation and choice created and offered by independent ISPs.

- **Service Differentiation - Content Filtering**

One area of service differentiation involves content filtering. Today, this usually consists of two very different types of service. One, often thought of as "family-friendly" filtering, intentionally blocks access to services believed to be unsuitable to some classes of viewer. Courts have ruled that this cannot be mandated of an ISP, but there are ISPs and FISPA members, especially focused in certain geographic regions, that choose to offer this because of their constituencies.

Another type of filtering is anti-spam defense. Here, there are several approaches at work. It is not always easy for a machine to tell spam from valid email. Some ISPs leave all filtering to the end user. Others block mail that fails some kind of protocol or other test. For example, there is currently a debate in the protocol community around Sender Policy Framework ("SPF") and competing methods of distinguishing forged email. Some ISPs choose block lists

from among the many blacklist services now available. These services are not 100% reliable, so ISPs have to choose which ones they find most useful, and implement blocking policies. Some ISPs use rule-based filters such as SpamAssassin. Some use Bayesian filtering of the content. Some use human-mediated spam block services, such as Brightmail, which have rapidly-updated active spam filters that block specific spam messages before they are widespread. And for each of these anti-spam techniques, the ISP chooses whether to block the mail entirely, move it to a special mailbox that the user can choose to query to search for the occasional false positive, or merely label the message as questionable so that the user can filter it. An ISP monopoly unconstrained by regulatory safeguards can destroy these variations and the public will be the loser.

A particular example of the risks of choosing a blocking strategy is the case of Verizon Online which, in December, 2004, implemented a new anti-spam policy which used extremely broad criteria for determining what might be spam. This reportedly included most mail servers outside of the United States, including those of many major overseas corporations and ISPs. Such mail was blocked, rather than simply labeled, preventing users of Verizon Online's mail service from receiving large volumes of legitimate mail. Users reported that Verizon's suggested fix was for them to get Hotmail accounts, and to tell all of their correspondents to use that in lieu of their established verizon.net addresses. This type of problem would drive many customers away from an ISP that faced serious competition; instead, Verizon seeks to exclude competition from its DSL lines. While Qwest's petition would not absolutely exclude competing ISPs, it would certainly reduce the choice and increase the cost of alternatives.

- **Service Differentiation - Symmetry vs. Asymmetry of Bandwidth**

Consumer DSL services are almost always provisioned using *Asymmetric* DSL technology. This usually works well because consumer demand tends to be much greater in the download than upload direction. Business subscriber requirements tend to be far more symmetrical. Existing DSL tariffs generally permit the ISP to choose between different speed packages, allowing for a variety of upstream and downstream bandwidth offerings.

ADSL technology is capable of being less asymmetric. Some ISPs use ILEC ADSL services with the upstream and downstream bandwidth both set to 640 kbps. This is near the maximum upstream and minimum downstream rate, but it provides a business-class symmetric service using inexpensive ADSL equipment. The cost of this to the underlying ILEC is essentially the same as for a more asymmetric service; the choice is made at the ISP layer, not the telecommunications service layer.[60] This choice would be lost under Qwest's requested forbearance.

- **Service Differentiation - Vertical Services**

Retail ISPs provide a number of "vertical" services in addition to raw Internet access. These are also differentiators. America Online, for instance, sells a "bring your own" service that provides no access, merely permission to use its vertical services. But most subscribers pick an ISP that provides a bundle of access and vertical services. The most familiar vertical service is probably email. This has many differentiators other than the aforementioned spam filtering. Email, in turn, has two functions: relaying (used for sending) and servers. The relaying function

[60] The maximum downstream rate for ADSL is 8 meg, the maximum upstream for ADSL is 1 meg. Some ISPs use a combination of asymmetric upstream and downstream to offer a more symmetric offering, suitable for business. For example, an ILEC's 768Kbps x 512Kbps ADSL offering can be used to create a 512x512Kbps symmetric service offering.

of most ISPs is straightforward, allowing users of their networks to send email anywhere via their server. There are, however, subtle differences. The Internet's mail protocol, SMTP, uses port 25. As an anti-spam measure, some ISPs block port 25 sent from the user to anyone but the ISP server. This prevents virus-hijacked machines from becoming bulk senders. But it also prevents users from sending mail directly, as some choose to do. A few ISPs permit port 25 SMTP sending but cap the volume, which allows typical users' email to flow, but blocks the torrent caused by a virus.

Verizon Online, however, instituted a policy by which its users are required to put Verizon's domain name in the header of their message, instead of the name of their chosen email address (which, of course, could be a private domain or a different service). This *mandatory advertising* policy is incompatible with many users' preferred mode of operation, but is nonetheless imposed on Verizon's DSL subscribers.

Email receiving options are also varied. Retail ISPs provide an email server that stores incoming emails until fetched. These do not all behave the same. They have different storage capacity quotas, blocking emails once the quota is full. Most support POP3, a simple protocol that allows retrieval of email by a client. A few ISPs support IMAP4, a more elaborate protocol that allows manipulation of the email on the server, and allows email to remain on the server while being filed by a mailbox or selectively retrieved. Some ISP POP3 servers support an option that allows email to be selectively retrieved by multiple clients (say, a user's desktop and laptop computers) while retaining knowledge that it has or has not been already retrieved once. Some encrypt passwords in transit; some do not. Many, but not all, offer web-based access as well. Many offer more than one mailbox per account, especially suitable for families; some only offer one.

Independent ISPs also offer additional services such as personal web pages. Web services vary in terms of storage capacity, usage quota, page creation support and available features (Common Gateway Interface or Active Server Page support, PHP programming, etc.). Some broadband ISPs also offer dial-up support for travel, with or without a quota of "free" hours. Some provide help with virus removal; others bundle it in software. Some support only Microsoft Windows users; some provide support for Apple Macintosh and Linux users.

What becomes of this clearly beneficial diversity if the Commission grants Qwest's Petition? Homogeneity in information services and technology benefits no one but the dominant provider of both content and transmission. The Commission must not grant Qwest the opportunity to squelch the diversity in options driven by independent ISPs – but that is exactly what Qwest is asking the Commission for authority to do.

- **Service Differentiation - Servers and Tunnels**

Independent ISPs often prohibit residential retail customers from having "servers" on their lines. This is widely done to prevent subscriber web servers from overloading the upstream direction; cable modem networks are especially limited in the upstream direction. But just how this is interpreted does vary from ISP to ISP. Some have policies against using secure tunneling protocols, such as IPsec. Some allow private email servers, some do not. Again, this is the type of issue that is best handled in a vibrant, competitive market with many players. These issues do not impact the underlying telecommunications layer, only the higher layers serviced by independent ISPs.

The "layered" approach to regulatory policies, as supported by FISPA and favored by the vast majority of non-ILEC commenters in the WC Docket No. 02-33 rulemaking proceeding is fully compatible with this approach. Forbearance is not.

The preceding Sections demonstrate that the current regulatory system has worked, continues to work, and has resulted in immeasurable benefits and abundant choice to the American consumer. Qwest's Petition creates a clear and present danger to these achievements and threatens continued diversity, tailoring of services, and customer choice made possible by independent ISPs. The Petition must be denied.

III. SECTION 10(d) PROHIBITS FORBEARANCE FROM SECTION 251(c) AND 271 REQUIREMENTS.

Section 10(d) places an explicit "[l]imitation on the remainder of section 10," providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271 ... until it determines that those requirements have been fully implemented."[61] Qwest's failure to satisfy the requirements of section 10(d) mandate the denial of the Petition.[62] Qwest presents distorted and unconvincing evidence to support the conclusion that a robust wholesale market exists that enables competing providers to obtain access to the telecommunications services and facilities they require to enter the market without the need for continued enforcement of section 251(c) or 271. Indeed, Qwest cannot satisfy the requirements of section 10(d) because it continues to exercise market power over the facilities that connect consumers to the Internet. Thus, the request for forbearance must be denied.

IV. THE CURRENT REGULATORY FRAMEWORK GOVERNING ILEC BROADBAND SERVICES SHOULD REMAIN UNCHANGED.

While imperfect in its enforcement, the existing regulatory system has a long history of success. FISPA posits that what is not broken need not be fixed. Indeed, the Commission should take note of the history of achievement and consumer choice given life through the

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[61] 47 U.S.C. §160(d).

[62] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, 18 FCC Rcd. 23525, ¶¶5, 9 (2003).

current regulatory framework and consider extending and enforcing these requirements on all broadband platforms and other facilities that remain essential to deliver information content to the American consumer, regardless of geographic location or income level.[63]

A public utility is regulated because its services are so important and ubiquitously required that economies of scale either warrant the grant of monopoly status or create the necessity for it. To control such power, government regulation is required to balance the competing interests of public need and right versus corporate goals and private rights. Whether the monopoly is a *natural* monopoly or one that warrants government recognition as a monopoly, the economic effect is the same - the cost of becoming another provider is significantly greater than the incumbent's cost, making competitive entry uneconomical or competitive survival problematic, post market entry.

While removal of some of the targeted regulations may slightly reduce Qwest's cost of doing business, the action Qwest's Petition asks the Commission to take creates a slippery slope that will ultimately lead to the undermining of over three decades of pro-competition policy.

V. CONCLUSION

Qwest's assertions fail to provide relevant factual support for the relief it requests. The Petition improperly highlights and distorts statistics in an effort to support its broad statements that the broadband market is optimally competitive. More importantly, Qwest conveniently ignores the relevant market – the wholesale DSL market – throughout its Petition. The forbearance Qwest seeks will have a profound impact on consumers and the public as a whole. The continued diversity of choices to consumers, development of information technology, and the future of a vibrant Internet rests on the denial of Qwest's Petition. The Commission should

[63] *See* BellSouth Opposition at pp. 6-17.

not entertain Qwest's Petition any more than it should entertain those filed by her sister RBOCs. The Petition must be denied.

Respectfully submitted,

THE FEDERATION OF INTERNET SOLUTION PROVIDERS OF THE AMERICAS

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/s/

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EXHIBIT A

CERTIFICATE OF SERVICE

I, Suzanne Rafalko, a legal secretary in the offices of The Helein Law Group, LLLP, do hereby state and affirm that copies of the foregoing "Opposition of the Federation of Internet Solution Providers of the Americas," have been served this 6th day of January, 2005, in the manner indicated, upon the following:

Marlene H. Dortch, Secretary Federal Communications Commission 445 12th Street, S.W. Room TW-A325 Washington, D.C. 20554 (Via Hand Delivery)	Original + 4 copies (Redacted) 1 copy (Non-Redacted)
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Daphne E. Butler, Senior Attorney Qwest Corporation 1801 California Street, 9th Floor Denver, Colorado 80202 (Via Overnight Courier)	1 copy (Non-Redacted)

/s/

Suzanne Rafalko